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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BLINDER, ROBINSON & CO., INC., AND MEYER BLINDER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS BLINDER, ROBINSON & CO., INC. AND MEYER BLINDER

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REPLY BRIEF OF PETITIONERS BLINDER, ROBINSON & CO., INC. AND MEYER BLINDER

ARGUMENT

I. The Government Incorrectly Diminishes the Degree and Significance of the Split Between the Courts of Appeals over the Standard Governing Motions To Dissolve or Modify an Injunction.

1. The Government's opposition greatly understates the split in the Circuit Courts on the continued vitality and general applicability of *United States v. Swift*, 286 U.S. 106 (1932). According to the Government, there are no more than "minor differences in formulation in the various opinions" of the courts of appeals on the standard to apply to such a motion. Opp. at 8-9. In fact, the differences between the courts of appeals are manifest and fundamental, as those courts themselves have repeatedly and explicitly recognized.

The Government does not dispute that a number of the relevant decisions recognize that there is a conflict and expressly reject the approach employed by the court below. *See* Pet. at 10-11. Instead, the Government attempts to diminish the differences between the Circuits by groping for perceived factual similarities that might reconcile the various decisions. Thus, for example, the Government struggles to find a common standard by asserting that "[e]very one of the decisions that approved the vacating of an injunction at the behest of the party subject to it did so only upon finding a substantial change of condition, as the court of appeals required here." Opp. at 8. The Government's assertion of isolated factual similarities, however, misses the point. Even if it were true (which it is not) that every court requires a substantial change of condition,[1] that similarity says nothing about

[1] The Second Circuit, for example, has held that "there is power to modify an injunction *even in the absence of changed conditions*, ..." *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (emphasis added).

the other critical *differences* between the strict *Swift* approach employed by the court below and the flexible, balancing approach used by other courts.

Under the *Swift* standard, the movants must meet each of the following requirements: (1) there must be a showing of "grievous wrong"; (2) the harm must be "evoked by new and unforeseen conditions"; and (3) the need for the injunction must be completely eliminated.[2] The balancing approach, on the other hand, does not require that the harms be caused by unforeseen conditions,[3] and, rather than requiring an extreme showing of *both* oppressive harm and a complete absence of need, weighs one factor against the other.[4]

The Government also tries to reconcile the various decisions by maintaining that in each case, "the court,

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[2] Pet. App. 4a-6a. Because of a typographical error at page 9a of the Appendix to our original petition, a corrected copy of the decision below is attached as an Appendix to this reply.

[3] The Government is simply wrong in asserting that petitioners "propose to weigh only those consequences of the injunction that are of 'much greater significance' than originally anticipated." Opp. at 10-11 (quoting Pet. at 14). The Government reaches that conclusion only by quoting the language from the petition grossly out of context. Petitioners merely made the point that "a collateral effect of no appreciable concern years earlier [may subsequently] take[] on *much greater significance*." Pet. at 14 (emphasis added). Petitioners did *not* propose that only such consequences be weighed.

[4] These differences are far more than theoretical, as the decisions of the courts below demonstrate. Because each prong of the *Swift* test must be met by movants, courts inevitably ignore critical evidence on one prong of the test once they find that any of the other prongs have not been met. Thus, for example, the district court below found it perfectly appropriate to ignore nearly all of petitioners' unrebutted evidence of rehabilitation and changed circumstances because it found one paragraph in a 54-page affidavit (one of many sworn submissions evidencing petitioners' rehabilitation and harm to petitioners and innocent third parties) that it construed to suggest a possible lack of rehabilitation.

unlike the court in this case, found that the purpose of the injunction had been fulfilled and hence that there was no further need for the injunction." Opp. at 8. Again, the suggested similarity is illusory. Unless the standards of adjudication articulated by the courts are to be ignored as mere surplusage, it is apparent that the considerations demanded in some Circuits involving the balancing of harm against the level of need differ substantially from those applying the strict *Swift* test. These courts clearly recognize that the presence of some continuing purpose for an injunction can be outweighed by other factors, a result the strict *Swift* standard precludes.[5] An examination of the Second, Third, Fourth and Seventh Circuit cases discussed in the petition (at 10-11) leaves little doubt that under *Swift's* three-pronged test the results would have differed.

2. The Government argues that adoption of a balancing test would not aid petitioners because, even under such a test, "there would be nothing in this case to weigh in petitioners' favor in the balance . . . ." Opp. at 11. The Government should know well that this Court has consistently declined to make any such factual judgments in the first instance. For nearly three years petitioners have sought unsuccessfully to have a court consider all of the facts relevant to a balancing process. But, in large part because the SEC has successfully argued that the strict *Swift* standard governs, petitioners have not had the opportunity to have a court consider this evidence using an appropriate standard.

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[5] *See, e.g., Philadelphia Welfare Rights Org'n v. Shapp*, 602 F.2d 1114, 1120-21 (3d Cir. 1979) (affirming modification of injunction even though "the object . . . has not been fully achieved"), *cert. denied*, 444 U.S. 1026 (1980); *SEC v. Crofters, Inc.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,018, at 94,820-21 (S.D. Ohio Aug. 23, 1982) (dissolving injunction despite finding of some level of need).

II. The Government's Brief Demonstrates that the *Swift* Standard Is Not the Appropriate Standard for Dissolution or Modification of Injunctions Under the Federal Securities Laws.

In their petition, petitioners argued that the *Swift* standard is particularly inappropriate for determining whether to dissolve an SEC injunction because it fails to give weight to the unusual and severe collateral consequences that accompany an SEC injunction. Pet. at 12. Application of the *Swift* "unforeseen conditions" standard virtually precludes the court from determining whether the injunction has become an "instrument of wrong." *Id.* at 15.

Far from denying that the *Swift* test precludes a court from considering the severe collateral consequences that often accompany an SEC injunction, the Government emphasizes the point. It readily agrees that such consequences can never be considered because "the full extent of the possible regulatory sanctions [are] readily foreseeable, as such sanctions are clearly provided for by law." Opp. at 11. The Government supports this virtual *per se* approach to SEC injunctions by arguing that "weighing such sanctions would undermine the legislative judgments to make such sanctions available" (Opp. at 10), and would deprive investors "of the needed protection afforded by an injunction . . . simply because [the] regulatory bodies are, as authorized by law, using the injunction in their disciplinary proceedings." *Id.* These assertions are without merit.

Petitioners do not quarrel with the legislative determination that SEC injunctions bear some collateral consequences. But petitioners do argue that neither Congress nor any state legislature has made, or can make, a legislative judgment concerning whether the sum of the collateral consequences in a particular case outweighs the continued need for the injunction. That determination is peculiarly a judicial determination, based on the facts unique to each case.

Moreover, the Government's assertion that consideration of collateral consequences under a balancing approach deprives investors of the "needed protection of an injunction" is widely off the mark. Petitioners have never asserted that the mere existence of collateral consequences tips the scales so heavily that all injunctions should and will be dissolved if and when such consequences attach. On the contrary, the balancing approach merely allows the court to weigh those consequences, together with other harms (including harm to third-parties), against the continued need for the injunction.

III. The Court Should Grant Certiorari To Resolve the Separation of Powers Issue.

1. The Solicitor General evidently agrees with petitioners that the court of appeals incorrectly found the exercise of civil injunctive power by the SEC consistent with the separation of powers. Only the SEC asserts "the court of appeals was correct in so holding." Opp. at 12 n.7. Rather than addressing the merits, the Government argues that concerns of waiver and finality should prevent this Court from reaching the fundamental constitutional issue presented in this case. Opp. at 12-15.

Neither court below viewed this as an appropriate ground for resolving the case. We show below that the Government's resort to these issues is ill-founded. As a result, and in view of the manifest significance of the separation of powers issue, the Court should grant certiorari to review the decision below.

2. Lack of subject-matter jurisdiction is not a waivable defense. *See, e.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 2268, 2271 (1988). The Government does not dispute this issue. The Government contends that the constitutionality of the SEC's enforcement power goes only to the agency's capacity to sue and not to the subject-matter jurisdiction of the court. This argument is contradicted by every

court that has considered similar issues, all of which treat an agency's capacity to sue as going to subject-matter jurisdiction.[6]

3. The Government's argument that consideration of the district court's lack of subject-matter jurisdiction is barred by *res judicata* also fails. The Government fails entirely to demonstrate how principles of *res judicata* can properly be applied to the issue of subject-matter jurisdiction in the context of an ongoing injunction. The district court has continuing oversight over the injunction it issued in 1982. There must be a basis for that continuing jurisdiction, *United States Catholic Conference*, 108 S.Ct. at 2271, and, as this Court has often recognized, subject-matter jurisdiction cannot be conferred on the court by any party's earlier failure to challenge jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978). The Government's assertion that principles of *res judicata* preclude a challenge to subject-matter jurisdiction over a continuing injunction exactly as they preclude a similar collateral attack on a final judgment is totally unsupported.[7]

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[6] *See Marshall v. Gibson's Products, Inc.*, 584 F.2d 668 (5th Cir. 1978) (lack of statutory authorization for petition by Department of Labor deprives court of subject-matter jurisdiction); *ICC v. Southern Ry. Co.*, 543 F.2d 534 (5th Cir. 1976) (lack of consent by Attorney General to suit by ICC deprives court of subject-matter jurisdiction); *FTC v. Guignon*, 390 F.2d 323 (8th Cir. 1968) (same, in suit by FTC).

[7] The Government cites only Comment C to the Restatement (Second) of Judgments § 13. This Section and Comment are not addressed to the issue of the preclusive effect of judgments on questions of subject-matter jurisdiction. Section 12 of the Restatement addresses this question, and, in fact, calls for nonpreclusion in the case at bar because "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government." Restatement (Second) of Judgments § 12, at 115 (1982). That Section also recognizes that where as in this case the issue of subject-matter jurisdiction was only implicitly decided (without actual contest of the issue between the parties), the arguments in favor of allowing post-judgment attacks are particularly

The Government has cited no case or commentary precluding a challenge to the continuing jurisdiction of a federal court over an injunction after it becomes apparent that subject-matter jurisdiction is lacking. On the contrary, it is settled that a challenge to subject-matter jurisdiction may be raised, notwithstanding principles of *res judicata*, in defense to a civil contempt action brought for willful violation of an injunction. *Ex parte George*, 371 U.S. 72, 73 (1962); *Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336, 1347 (3d Cir. 1976). It follows *a fortiori* that subject-matter jurisdiction may be challenged by a party who has obeyed, but seeks to vacate, the injunction.

4. Even if petitioners had waived their right to challenge the continuing subject-matter jurisdiction of the court, the issue was properly before the court under Fed. R. Civ. P. 60(b). This Court has made it clear that whenever there has been a material change in the applicable law, it is proper to reconsider an injunction under Rule 60(b). *System Federation No. 91, Ry. Employees' Dep't. v. Wright*, 364 U.S. 642, 647-48 (1961). Since 1982, this Court's view of the law of separation of powers has evolved and developed significantly.[8] The

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strong. *See id.* at 120-22, Comment D. The Restatement nowhere addresses the question of a challenge to the continuing power of a court of limited jurisdiction over an injunction issued without proper jurisdiction.

[8] *See, e.g., Mistretta v. United States*, 57 U.S.L.W. 4102 (U.S. Jan. 19, 1989); *Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987); *CFTC v. Schor*, 478 U.S. 833 (1986); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). To the extent that the Government alleges laches, petitioners raised this issue was less than three weeks after this Court decided *Bowsher*. In any event, subject-matter jurisdiction cannot be conferred by laches. *Owen Equipment*, 437 U.S. at 377 n.21; *Sadat v. Mertes*, 615 F.2d 1176, 1188-89 (7th Cir. 1980).

elaboration of the law since 1982 makes it appropriate to revisit the issue today. *Wright*, 364 U.S. at 648.

5. In any event, as the Government concedes, Opp. at 14, where the previous judgment was so far beyond the court's power as to constitute a "usurpation of power," it is void. The prosecution of an enforcement action by an agency constitutionally disabled from doing so is a far greater "usurpation of power" than others routinely remedied under Rule 60(b). *See, e.g., CFTC v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); *SEC v. Seaboard Corp.*, 666 F.2d 414 (9th Cir. 1982).

6. Finally, whatever the application of waiver principles in other legal contexts, they do not apply here. As this Court held in *Schor*, 478 U.S. at 850-51, where the "structural principle" of separation of powers is at issue, "notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect."[9] Any purported waiver by petitioners cannot cure the SEC's breach of the separation of powers, and the issue is properly before this Court.

7. The accelerating expansion by Congress of the SEC's law enforcement authority beyond civil injunctive enforcement powers also argues for early consideration by this Court of the separation of powers issues raised here. In recent years, Congress has made the SEC the primary locus for law enforcement relating to the Nation's financial markets, at the expense of the Executive Branch.

— In 1984, Congress granted the SEC the authority to commence actions in United States District Court to

[9] In *Schor*, the petitioner voluntarily chose to present his state-law counterclaim in an administrative forum, and consented to a judgment dismissing his action brought in district court challenging the appropriateness of the administrative forum. 478 U.S. at 837-39. Despite the *res judicata* effect of the district court judgment and the waiver inherent in petitioner's agreement to proceed administratively, this Court held that it was proper to reach his constitutional argument. *Id.* at 851.

collect trebled civil penalties for securities law violations involving insider trading. *See* 15 U.S.C. § 78u(d)(2) (Supp. IV 1987).

— In 1988, Congress granted the SEC the authority to commence actions in United States District Court to collect civil penalties for violations of the Foreign Corrupt Practices Act. *See* Pub. L. No. 100-418, 102 Stat. 1419.

— Again in 1988, Congress expanded the SEC's law enforcement in insider trading cases to allow the SEC to commence actions in United States District Court to collect a $1 million civil penalty. *See* Pub. L. No. 100-704, 102 Stat. 4677.

— Elsewhere in the same statute, Congress granted to the SEC the power to commence investigations at the request of foreign governments and stock exchanges, and to make its own requests to these foreign entities for similar investigations. No Executive Branch consultation is required. *See* Pub. L. No. 100-704, 102 Stat. 4681.

— Finally, in response to a request from the Congress, the SEC recently proposed to Congress new legislation that would grant the SEC the enforcement authority (i) to bar individuals from acting as officers or directors of public companies; and (ii) to institute actions to impose civil penalties as high as $500,000 per institution and $100,000 per person for any securities law violation. *See* Reply App. 11a-12a (letter from SEC Chairman Ruder submitting these proposals).[10]

The separation of powers issue raised by these expanded enforcement powers are substantially identical to those raised in this case as to the civil injunctive enforcement power. These developments signal the signifi-

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[10] The SEC has also proposed that it become essentially self-funding. *See* Self-Funding Study Submitted in Partial Response to the Request of the Securities Subcommittee of the Senate Committee on Banking, Housing and Urban Affairs (Dec. 20, 1988).

cance, impact, and immediacy of the issues raised in this petition.

8. This Court's recent decision in *Mistretta* supports this petition. *Mistretta* noted that the Executive Branch's control over the Sentencing Commission "is greater than in other independent agencies, such as the Securities and Exchange Commission[.]" 57 U.S.L.W. at 4109 n.14. *Mistretta* also noted that a primary concern in separation of powers jurisprudence is "encroachment and aggrandizement" of the legislative branch at the expense of the other Branches. *Id.* at 4107. Thus, the Tenth Circuit's failure in the case at bar to consider the influence of Congress over the prosecutorial decisions of the SEC is inconsistent with *Mistretta*. *See* Pet. at 25-29.

Mistretta also described the Sentencing Commission's mandate as involving almost exclusively rulemaking, a function not specifically entrusted to any one Branch. 57 U.S.L.W. at 4109-11. The Court specifically contrasted this with what it described as the "exclusively executive enforcement power[.]" *Id.* at 4109 n.14. It is exactly this "exclusively executive" law enforcement power that is at issue in this case. *See* Pet. at 17-20.

Respectfully submitted,

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January 27, 1989

APPENDIX

APPENDIX

[reported at 855 F.2d 677]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-2319

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

BLINDER, ROBINSON & CO., INC. and MEYER BLINDER,
Defendants-Appellants.

Aug. 24, 1988

Before MCKAY and BRORBY, Circuit Judges, and PARKER,* District Judge.

BRORBY, Circuit Judge.

Blinder, Robinson and Co., Inc. and Meyer Blinder both appeal the orders of the United States District Court denying appellants' motions to vacate an injunction.

Appellant Blinder, Robinson and Co., Inc. (Blinder, Robinson) is a nationwide broker/dealer in securities. Appellant Meyer Blinder was a founder, and at all times relevant herein, was and is Blinder, Robinson's principal shareholder and president. In 1982, the United States District Court for the District of Colorado, following

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*The Honorable James A. Parker, United States District Judge for the District of New Mexico, sitting by designation.

trial, found the Blinder, Robinson sales force practiced a program of disseminating "deliberately deceptive misinformation," orchestrated by Mr. Blinder. The court specifically found that Mr. Blinder had acted with an "intent to deceive" investors. Based upon these and other findings, the district court entered injunctions prohibiting appellants from engaging in specified practices in violation of various provisions of securities law. The injunctions can be described as ordering appellants to obey the law. Upon appeal, this court affirmed the decision of the district court in an unreported decision in September 1983. Appellants thereafter filed an action against the Securities and Exchange Commission (SEC) seeking an injunction, declaratory relief and damages. This action was predicated in part upon a continuing investigation by the SEC. Another theory of this action was that appellants were represented by incompetent or negligent counsel in the original enforcement action. This court sustained the trial court's decision which denied relief to appellants. *Blinder, Robinson & Co. v. United States Sec. & Exch. Comm'n*, 748 F.2d 1415 (10th Cir.1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2655, 86 L.Ed.2d 272 (1985).

In May 1986, appellants filed a motion with the district court to vacate the injunction This motion was accompanied by affidavits, exceeding several hundred pages, by which appellant Blinder sought to demonstrate: (1) Blinder, Robinson has grown dramatically and prospered financially; (2) appellants are generous and have supported many philanthropies; (3) most of the key management, with the exception of Mr. Blinder, who remains the president, has been changed; (4) future violations of securities law are highly unlikely due to sweeping changes in personnel and procedures; and, (5) based solely upon the district court's injunction and the underlying findings, eleven states have attempted to sanction Blinder, Robinson, the result of which has taken a toll on the

firm, its officers, representatives, employees, and thousands of wholly innocent persons, these innocent persons being Blinder, Robinson's stockholders. The appellee filed nothing contravening the appellants' affidavits.

In July 1986, the district court denied appellants' Motion to Vacate the Injunction finding, *inter alia*, that Mr. Blinder remained in control of Blinder, Robinson and was not fully aware of his own fault in this case; that the court was well aware of the authority of the SEC and the state regulatory authorities to take further action based on the injunction at the time the injunction was issued; that demonstrated philanthropy has nothing to do with the case; that no extreme and unexpected harm was shown; and, that the court could not say the public no longer needs the protection of the injunction. The court thereupon entered its order denying appellants' motion to vacate the injunction. Appellants then filed a motion for reconsideration and raised constitutional questions regarding the authority of the SEC to appear before the court as plaintiff. The court denied this motion.

Appellants appeal these rulings of the district court, and claim: (1) the district court applied an excessively rigid standard for the dissolution or modification of the injunction; and (2) the civil prosecution of appellants in this case by the S.E.C., without any participation by the Executive Branch, violated the constitutional doctrine of separation of powers.

We will consider these issues *seriatim*.

I

Motion to Vacate Injunction

Motions to vacate injunctions lie within the discretion of the trial court, and the disposition below will not be disturbed on appeal in the absence of an abuse of discretion. *Securities & Exch. Comm'n v. Thermodynamics, Inc.*, 464 F.2d 457, 459, (10th Cir.1972), *cert.*

denied 410 U.S. 927, 93 S.Ct. 1358, 35 L.Ed.2d 588 (1973). We will examine the issues raised under an abuse of discretion standard.

The appellants first argue that the trial court abused its discretion by applying the virtually impossible standard set forth in *United States v. Swift & Co.*, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed.2d 999 (1932), where in an opinion written by Justice Cardozo the Supreme Court held the standard to be used in deciding whether to vacate an injunction requires a clear showing of a grievous wrong evoked by new and unforeseen conditions. *Id.* at 119, 52 S.Ct. at 464. Appellants contend the trial court should instead apply the standards set forth in *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 88 S.Ct. 1496, 20 L.Ed.2d 562 (1968), wherein the Supreme Court held that an injunction may be changed if the facts and circumstances prevailing at the time of the issuance of the injunction have changed or new ones have arisen.

This court has been called upon many times to decide whether the standards of *Swift* remain applicable. *See Dowell v. Board of Educ. of Okla. City Pub. Schools*, 795 F.2d 1516 (10th Cir.), *cert. denied* 479 U.S. 938, 107 S.Ct. 420, 93 L.Ed.2d 370 (1986); *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir.1979), *cert. denied*, 446 U.S. 952, 100 S.Ct. 2918, 64 L.Ed.2d 809 (1980); *Securities and Exchange Comm'n v. Jan-Dal Oil & Gas, Inc.*, 433 F.2d 304 (10th Cir.1970); *Ridley v. Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir.1970); *Coca-Cola Co. v. Standard Bottling Co.*, 138 F.2d 788 (10th Cir.1943). In all of these cases, we applied the standard of *Swift*. In *Thermodynamics*, 464 F.2d at 460, we set forth the requirements of *Swift*.

> [*Swift*] presents a difficult and perhaps severe requirement, but changes in injunctions must be based on some substantial change in law or facts. The

> injunction was entered based upon the then existing state of the law and upon the then existing facts. The finality of such proceedings, or granting of remedy, requires a showing of change. This is what *Swift* requires.

We conclude the trial court utilized the correct standard of law in its analysis of this case.

Appellants argue they have been heavily burdened by the injunction, and point to a barrage of state and federal regulatory actions. The trial court's response to this contention was that it was cognizant of these consequences when the injunction was issued. The trial court understood that *Swift* requires clear proof of *unforeseen* conditions, prior to vacating an injunction, and correctly ruled that Blinder, Robinson and Mr. Blinder failed to meet that burden of proof.

Appellants next contend the trial court abused its discretion in arbitrarily deciding not to credit the unrefuted evidence of rehabilitation. They argue there was no basis for the trial court to conclude that Mr. Blinder was not fully aware of his past mistakes and therefore might repeat them. We would note the trial court carefully considered the steps taken by Blinder, Robinson to ensure the firm's future compliance with securities laws and balanced this against the court's finding that Mr. Blinder continued to control the company. In response to the affidavit of Mr. Blinder, the trial court stated:

> I am not sure he [Mr. Blinder] still understands what happened here. There is a tendency once again to say, well, I made a mistake, I should have asked for a written opinion. . . . That isn't the reason for the injunction. There was a disregard not just for the opinions of counsel, but a disregard of the requirements of the law.
>
> And Mr. Blinder remains in control of this organization. . . . Mr. Blinder . . . is not fully aware

> of his own fault in this case and one of the reasons . . . for the injunction against his firm.

The trial court noted that the interest to be protected by the injunction was a public interest (i.e., the integrity of the securities industry), and the reason for the injunction was the ability of the enforcement agency to come to court and show a violation and to then have available the quick remedy of contempt.

Mr. Blinder's own affidavit further supports the conclusions of the trial court: "I, *Meyer Blinder*, have been and continue to be President, Chief Executive Officer, and a Director. I exercise overall executive authority." In explaining the original violations, Mr. Blinder continued: "I did not request a formal, written legal opinion from counsel . . . and I now feel the failure to do so was a significant mistake by me." Couple this sworn statement with the trial court's original findings that Mr. Blinder made a business decision contrary to the advice of the attorney and a specific finding of "intent to deceive, manipulate, or defraud," and it becomes quite evident that the record supports the conclusions of the trial court. The trial court did not arbitrarily reject the evidence of rehabilitation. In view of the record, we cannot say the trial court abused its discretion in refusing to vacate or modify the injunctions.

II

The Constitutional Issue

Appellants argue that the power of the SEC to commence a civil enforcement action in federal court is in violation of the separation of powers principle. Appellants contend that the SEC is an independent agency empowered to enforce a federal law by means of civil actions for injunctions, and that the President is given sole and exclusive control over the execution of the laws under Article II of the Constitution which provides that the

President shall "take care the laws be faithfully executed."

The trial court held the SEC may constitutionally exercise civil enforcement authority. This is a conclusion of law which we review *de novo*. *Boise City Farmers Coop. v. Palmer*, 780 F.2d 860, 866 (10th Cir.1985).

A brief overview of the SEC will be helpful in understanding the constitutional issue presented. The creation, composition, and powers of the SEC are found in the Securities Exchange Act of 1934. The commission consists of five members who are appointed by the President with the advice and consent of the Senate. The terms of the commissioners are staggered and the basic length of each term is five years. No more than three of the commissioners may be members of the same political party. The statute does not provide for a chairman. Until 1950, the Chairman was elected annually. Following Reorganization Plan No. 10 of 1950 (*see*, Reorganization Act of 1949, 5 U.S.C. §§ 901-913), the President designates the chairman. Pursuant to this Reorganization Plan, the chairman succeeded to most of the executive and administrative functions of the commission. The Act does not expressly give to the President the power to remove a commissioner. However, for the purposes of this case, we accept appellants' assertions in their brief, that is commonly understood that the President may remove a commissioner only for "inefficiency, neglect of duty or malfeasance in office." While the SEC must transmit evidence of criminal misconduct to the Attorney General, there can be no doubt the SEC is authorized to institute civil actions in the federal district courts to enforce various security laws.

Several conclusions can be drawn from this brief overview. First, as the President has the power to choose the chairman of the SEC from its commissioners to serve an indefinite term, it follows that the chairman serves at the

pleasure of the President. Second, as the chairman controls key personnel, internal organization, and the expenditure of funds, the chairman exerts far more control than his one vote would seem to indicate. Third, it can safely be assumed that in exercising his power of appointment, even as to commissioners who are not members of his party, the President will tend to appoint those persons who are sympathetic to his own views.

In *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), President Roosevelt requested Humphrey's resignation as a commissioner of the Federal Trade Commission for the reason that Humphrey and the President had differing policies concerning the administration of the commission. The statute provided that a commissioner could be removed "for inefficiency, neglect of duty, or malfeasance in office." The Supreme Court recognized the intent of Congress to create a commission that was not to be subject to anyone in the government—a body which should be independent of executive authority, *except in its selection*, and ruled that the concept of a member continuing in office at "the mere will" of the President might thwart the very ends Congress sought to realize. The Supreme Court next turned its attention to the question of whether such a limitation on the President's right to remove a commissioner is constitutional under the principles of separation of powers. The Court held that whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding removal except for cause, will depend upon the character of the office. The Court concluded "as to officers of the kind here under consideration" no removal can be made except as provided by statute. The Supreme Court noted the ruling would be equally applicable to members of the Interstate Commerce Commission. Both the FTC and the SEC are administrative bodies created by Congress to carry into effect

legislative policies embodied in the statute. We conclude the same reasoning would apply to commissioners of the SEC.

More recently, in *Morrison v. Olson*, —— U.S. ——, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), the Supreme Court decided the constitutionality of the independent counsel statutes. The law in question there provides for the appointment of an independent counsel to investigate and prosecute certain government officials for violations of federal criminal law. The law in question generally provides that upon receipt of specified information, the court shall appoint independent counsel. An independent counsel may be removed, other than by impeachment and conviction, only by the Attorney General and only for good cause, physical disability, or mental incapacity.

We note that *Morrison* is predicated in part upon *Humphrey*, which stands generally for the proposition that Congress can, without violating Article II, authorize an independent agency to bring civil law enforcement actions where the President's removal power was restricted to inefficiency, neglect of duty, or malfeasance in office. *Morrison* teaches that the real question to be answered is whether the removal restrictions impede the President's ability to perform his constitutional duty. It is a matter of fundamental law that the Constitution assigns to Congress the power to designate duties of particular officers. The President is not obligated under the Constitution to exercise absolute control over our government executives. The President is not required to execute the laws; he is required to take care they be executed faithfully. The President has the power to appoint the commissioners; he has the power to choose the chairman of the SEC who has broad powers concerning the operation and administration of the commission; the chairman serves at the President's pleasure; and, the President has the power to remove a commissioner for inefficiency, neglect of duty, or malfeasance in office. We conclude

these powers give the President sufficient control over the commissioners to insure the securities laws are faithfully executed and the removal restrictions do not impede the President's ability to perform his constitutional duty.

We conclude the trial court correctly applied the proper legal standard concerning the vacation or modification of the injunction. We further conclude the civil enforcement power given to the SEC is constitutionally valid. We have carefully considered all issues raised by appellants, and those not discussed herein are found to be without merit.

For the reasons set forth herein, the judgment of the trial court is AFFIRMED.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

January 18, 1989

The Honorable George Bush
President
United States Senate
S-212 Capitol Building
Washington, D.C. 20510

Dear Mr. President:

The Securities and Exchange Commission is pleased to transmit the enclosed legislative proposal, the "Securities Law Enforcement Remedies Act of 1989," along with a memorandum in support of the legislation, and a section-by-section analysis. If enacted, the proposal would amend the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1950 to authorize new types of enforcement remedies.

This proposal is submitted pursuant to Section 3(c) of the Insider Trading and Securities Fraud Enforcement Act of 1988, which directs the Commission to submit "any recommendations the Commission considers appropriate with respect to the extension of the Commission's authority to seek civil penalties or impose administrative fines" other than those prescribed in that Act. In addition, this proposed legislation reaffirms the Commission's support for these new enforcement remedies, which were included, in substantially similar form, in a legislative proposal submitted to Congress by the Commission on September 28, 1988.

These amendments would permit assessment of new civil money penalties in certain administrative and civil proceedings under the federal securities laws, would per-

mit the Commission and courts to suspend or bar a violator of these acts from service as an officer or director of any company that files reports with the Commission, and would add violations of Section 16(a) of the Securities Exchange Act to the bases for instituting administrative proceedings under Section 15(c)(4) of that Act. This additional sanctioning authority would enhance the Commission's enforcement capabilities and enable it to tailor enforcement remedies more precisely to particular facts.

The Commission believes that enactment of the Securities Law Enforcement Remedies Act of 1989 would significantly assist the Commission in carrying out its mission to enforce the federal securities laws. The Commission therefore urges the Congress to enact this proposed legislation.

The views expressed here and in the accompanying material are those of the Commission and do not necessarily express the views of the President. These materials are being submitted simultaneously to the Office of Management and Budget. We will inform you of any advice received from OMB concerning the relationship of these materials to the program of the Administration.

Sincerely yours,

/s/ David S. Ruder
DAVID S. RUDER
Chairman

Enclosure